

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ESTATE OF WILLIAM A. STEWART, JR.,  
Plaintiffs,

Case No.: 10 CIV. 2632 (LTS)(JLC)  
ECF Case

-against-

SUGAR HILL MUSIC PUBLISHING,  
LTD., DIAMOND HEAD MUSIC,  
INC. d/b/a TWENTY NINE BLACK  
MUSIC, JOEY ROBINSON, SYLVIA  
ROBINSON and LELAND ROBINSON,

Defendants.

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**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

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**Federal Rule of Civil Procedure 8(d)(3)**

**13**

**17 U.S.C. §204(b)(1)**

**6**

**28 U.S.C. §1332(a)**

**24**



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**DEFENDANTS' MEMORANDUM OF  
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**PRELIMINARY STATEMENT**

This memorandum of points and authorities is submitted by defendants in support of their motion for summary judgment dismissing the claims of the Stewart Estate in the amended complaint. Claims asserted by plaintiffs Cook and Chisolm have been dismissed by stipulation.

**STATEMENT OF FACTS**

The Stewart Estate alleges claims for copyright infringement, breach of contract, unjust enrichment, and rescission, all relating to defendant Sugar Hill Music Publishing, Ltd.'s ("Sugar Hill") interest in the copyright in the musical composition entitled "No Diggity," which was co-authored by William A. Stewart, Jr. Copies of the amended complaint and answer are annexed as Exhibits A and B to the Declaration of James P. Cinque (the "Cinque Dec.").

The Stewart Estate has consistently taken the position that Stewart did not enter into any

agreements with defendants. Yet, it asserts three claims (Count Seven for breach of the Assignment and Agreement, Count Eight for unjust enrichment for defendants' failing to pay monies due under the Assignment and Agreement, and Count Nine for rescission of the Assignment and Agreement) based upon agreements with defendants. As plaintiff has continuously and repeatedly admitted that there were no agreements between Stewart and the defendants, claims sounding in contract must be dismissed.

Plaintiff admitted that there were no agreements in:

- (1) the original complaint, where it alleged that defendants infringed its copyright “without authorization or permission” (Ex. D to Cinque Dec., ¶ 25);
- (2) the amended complaint, where it makes the same allegation (Ex. A to Cinque Dec., ¶ 27);
- (3) the amended complaint, where it alleges that Stewart “never assigned his interest in the copyright” to defendants (Ex. A to Cinque Dec., ¶ 24);
- (4) the amended complaint, where plaintiff alleges that the Assignment “was never signed by William Stewart” (Ex. A to Cinque Dec., ¶ 93);
- (5) the Court-ordered answers to contention interrogatories, where plaintiff asserted that Stewart did not sign either the Assignment or Agreement (Interrogatory Nos. 1 and 3, Exs. E and F to Cinque Dec.);
- (6) its deposition testimony, where it stated that it has no knowledge of Stewart's entering into any agreements with any companies other than his own (Ex. G to Cinque Dec.); and
- (7) its failure during the course of discovery to produce any agreements with defendants (Cinque Dec. ¶ 9).

Plaintiff's numerous statements that Stewart did not enter into any agreements with defendants precludes plaintiff from pursuing any contract-based claims.

Plaintiff's copyright infringement claim has no basis whatsoever since Mr. Stewart on May 25, 1999 executed a notarized assignment of his interest in the "No Diggity" copyright to Sugar Hill (the "Assignment," Exhibit 1 to the Declaration of Joseph Robinson, Jr., the "Robinson Dec."). The Assignment does not require Sugar Hill to make any payments to Stewart. On the same day that he executed the Assignment, Stewart received a \$2,500.00 advance from Sugar Hill and signed an agreement with Sugar Hill and Lavaba Mallison, stating that "No Diggity" income was to be collected by Sugar Hill, which was to pay 60% to Stewart, 20% to Lavaba Mallison and keep 20% (see the Declaration of Lavaba Mallison and Ex. 1 thereto, the "Agreement").

The Notary Public who witnessed Mr. Stewart's signature confirmed that Mr. Stewart executed the Assignment in his presence (Ex. C to the Cinque Dec.). As Sugar Hill is an assignee of Stewart's interest in the copyright, it cannot possibly be deemed an infringer. Furthermore, all of the monies received by Sugar Hill from the exploitation of "No Diggity" were collected overseas by Sugar Hill's overseas sub-publishers. None of the income received by Sugar Hill was generated from any United States activities (Robinson Dec. ¶ 13). Sugar Hill never received any claim from Stewart or his Estate until shortly prior to the commencement of this action (Robinson Dec. ¶ 14).

Stewart and his Estate have collected over \$100,000.00 from the exploitation of "No Diggity" since May 25, 1999, which should have been paid to Sugar Hill pursuant to the terms of the Assignment (Robinson Dec. ¶ 15). Sugar Hill collected about \$30,000.00 in connection with

“No Diggity” in the last six years, 60% of which (\$18,000.00) would be due plaintiff under the terms of the agreements between the parties. However, since Stewart received a \$2,500.00 advance and since the Estate owes Sugar Hill more than \$40,000.00 as a result of its improper receipt of “No Diggity” income, not only is no money owed by defendants but in fact Sugar Hill is owed \$25,000.00 from plaintiff (Id.).

In its claim to rescind the Assignment and Agreement, the existence of which plaintiff has consistently denied, plaintiff does not offer to restore all of the consideration received and does not name Lavaba Mallison (a party to the Agreement, entitled to 20% of the “No Diggity” income) as a party to the action.

### **POINT I**

#### **THE STANDARDS FOR SUMMARY JUDGMENT**

In Poindexter v. Warner/Chappel Music, Inc., 2009 WL 302064 (S.D.N.Y.) at \*3, this Court summarized the relevant principles to be applied in connection with a summary judgment motion:

Summary judgment shall be granted in favor of a moving party where the “pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). In the summary judgment context, a fact is material “if it ‘might affect the outcome of the suit under the governing law,’ “ and “[a]n issue of fact is ‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’ “ *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir.2001) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts .... [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.” *Caldarola v. Calabrese*, 298

F.3d 156, 160 (2d Cir.2002) (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (alteration in original)). “[M]ere conclusory allegations, speculation or conjecture” will not provide a sufficient basis for a non-moving party to resist summary judgment. *Cifarelli v. Vill. of Babylon*, 93 F.3d 47, 51 (2d Cir.1996). The evidence is viewed in the light most favorable to the nonmoving party and all reasonable inferences are drawn in its favor. *Rubens v. Mason*, 527 F.3d 252 (2d Cir.2008).

## **POINT II**

### **THE COPYRIGHT INFRINGEMENT CLAIM SHOULD BE DISMISSED**

The Stewart Estate’s claim that defendants infringed the “No Diggity” copyright is deficient on several grounds.

The amended complaint alleges that William Stewart d/b/a Libvirg Publishing was a co-owner of the copyright in the musical composition entitled “No Diggity” (¶ 23 of Ex. A to the Cinque Dec.). While paragraph 24 of the Amended Complaint alleges that Stewart never assigned his interest in the copyright, it is clear that he did in fact do so. The Assignment is annexed as Exhibit 1 to the Robinson Declaration, and the Notary Public who witnessed Mr. Stewart’s signature confirmed that Mr. Stewart indeed appeared before him on May 25, 1999 and executed the Assignment (Ex. C to the Cinque Dec.). As Stewart transferred his interest in the “No Diggity” copyright to Sugar Hill, the Stewart Estate is no longer an owner of the copyright and Sugar Hill cannot be an infringer.

#### **(A) The Assignment Is Incontestable**

The Notary Public, Joseph LaMontagne, unequivocally testified that he witnessed Mr. Stewart’s signature on May 25, 1999. The notary also testified that his signature, printing, notary



stamp and notary seal appear on the original document which is still in Sugar Hill's possession.

No expert witness has challenged the authenticity of this Assignment.

As the Assignment was witnessed by a Notary Public in the United States, the Assignment by law is *prima facie* evidence of the copyright transfer, as stated in 17 U.S.C. §204(b)(1), which provides:

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is *prima facie* evidence of the execution of the transfer if –

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States;

No expert has challenged the authority of either the Assignment or the Agreement.

**(B) The Assignment Precludes the Stewart Estate's Claim of Copyright Infringement**

As Stewart assigned his share of the "No Diggity" copyright to Sugar Hill, the Stewart Estate cannot sue for infringement of the conveyed copyright interest. See, Cortner v. Israel, 732 F.2d 267, 271 (2d Cir. 1984): "It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him....;" and Carroll v. Kahn, 2003 WL 22327299 at \*4 (N.D.N.Y.): "Because a co-owner cannot be sued for infringement, no copyright claim can be asserted against [it]." Indeed, the law is well established that even a copyright licensee (as opposed to an owner) may not be sued for infringement. See, e.g.: Graham v. James, 144 F.3d 229, 236 (2<sup>nd</sup> Cir. 1998):

A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement. See Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 753 (11th Cir.1997); Peer Int'l Corp. v. Pausa Records,

*Inc.*, 909 F.2d 1332, 1338-39 (9th Cir.1990); *see also United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 695 (2d Cir.1991) (“[A]n exclusive licensee of any of the rights comprised in the copyright, though it is capable of breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the copyright rights conveyed to it.”).

and McKay v. Columbia Broadcasting Systems, Inc., 324 F.2d 762, 763 (2<sup>nd</sup> Cir. 1963):

a license from a co-holder of a copyright immunizes the licensee from liability to the other co-holder for copyright infringement.

As Sugar Hill is the assignee of the Stewart copyright interest in “No Diggity,” the Stewart Estate cannot sue for its alleged infringement.

**(C) The Copyright Infringement Claim Has No Basis since Sugar Hill Only Licensed “No Diggity” Abroad**

Sugar Hill only licensed “No Diggity” through its subpublishers abroad, and did not receive any income from licenses within the United States. Therefore, even if it had no agreement with Stewart, Sugar Hill could not be deemed an infringer of U.S. copyrights since its foreign subpublishers licensed the composition to foreign licensees. It is well-established that there is no jurisdiction over the Stewart Estate’s copyright infringement claims, since United States copyright law does not have extraterritorial application. *See, e.g.: Update Art, Inc. v. Modinn Publishing, Ltd.*, 843 F.2d 67, 73 (2<sup>nd</sup> Cir. 1988):

It is well established that copyright laws generally do not have extraterritorial application.

Filmvideo Releasing Corp. v. Hastings, 668 F.2d 91, 93 (2<sup>nd</sup> Cir. 1981):

copyright laws do not have extraterritorial application.

Robert Stigwood Group, Ltd. v. O’Reilly, 530 F.2d 1096, 1101 (2d Cir.) , cert. denied, 429 U.S. 848 (1976):

Copyright laws do not have extraterritorial operation.

Armstrong v. Virgin Records, Ltd., 91 F. Supp.2d 628, 634 (S.D.N.Y. 2000):

As a general principle, it is not seriously disputed that United States copyright laws do not have extraterritorial effect, and that infringing acts that take place entirely outside of the United States are not actionable under our copyright laws (citations omitted).

and Fun-Damental Too, Ltd. v. Gemmy Industries Corp., 1996 WL 724734 at \*6 (S.D.N.Y.):

Because plaintiff has failed to allege an infringement within the United States that led to extraterritorial infringement, the general rule that extraterritorial infringements are not violations of the Copyright Act applies, and the extraterritorial acts of infringement are not within this court's jurisdiction.

The Stewart Estate's copyright claim must be dismissed for lack of subject matter jurisdiction since Sugar Hill did not license the use of "No Diggity" within the United States.

### **POINT III**

#### **PLAINTIFF IS PRECLUDED FROM PURSUING CLAIMS BASED UPON AGREEMENTS BETWEEN THE PARTIES**

Plaintiff asserts three claims (Counts Seven, Eight and Nine) based upon the existence of agreements between Stewart and defendants. Specifically, Count 7 (for breach of contract) alleges that plaintiff has been damaged by defendants' breaches of agreements. Count 8 (for unjust enrichment) asserts that defendants have been unjustly enriched by collecting monies under agreements. Count 9 (for rescission) seeks to rescind the agreements. Defendants are entitled to summary judgment on these claims since plaintiff has consistently denied that there were any agreements with defendants: in its complaint, amended complaint, court-ordered answers to contention interrogatories, and deposition testimony.



In its original complaint the Stewart Estate brought a single claim against defendants: for copyright infringement. In paragraph 25 of the original complaint the Stewart Estate alleged that defendants infringed its copyright by “licensing ‘No Diggity’ without authorization or permission.” As part of its initial disclosures defendants provided plaintiff with a copy of the Assignment and Agreement pursuant to which defendants were exploiting “No Diggity.” The Stewart Estate then amended its complaint to add additional claims based upon the existence of these Agreements. However, the amended complaint still alleged that defendants’ exploitation of “No Diggity” was “without authorization or permission” (§ 27) and that “upon information and belief the purported Assignment was never signed by William Stewart” (§ 93).

The Estate’s representative testified that she was not aware of any agreements Stewart had with any company other than his own music publishing company. Plaintiff did not produce any agreement with defendants during discovery.

The Estate provided court-ordered answers to contention interrogatories which unequivocally stated that the Estate’s contention is that Stewart did not sign any agreement with defendants.

By asserting in two pleadings that there was no agreement between Stewart and defendants, by stating in its answers to contention interrogatories that there were no agreements signed by Mr. Stewart, by testifying at its deposition that it was not aware of any agreements between Stewart and defendants, by failing to produce any agreements during discovery, and by moving for summary judgment on the copyright infringement claim, the Stewart Estate has admitted that there were no agreements between Mr. Stewart and defendants, has elected its remedy, and cannot pursue claims based upon the existence of any agreements between the

parties.<sup>1</sup>

**(A) Plaintiff's Factual Allegations In Its Complaints Are Binding Admissions**

Plaintiff alleged in both its original and amended complaint that there were no agreements between plaintiff and defendants, and therefore defendants' exploitation of "No Diggity" constituted copyright infringement. As noted in Bellefonte Re Insurance Co. v. Argonaut Insurance Co., 757 F.2d 523, 528 (2<sup>nd</sup> Cir. 1985), the allegation that there were no agreements between the parties is binding upon plaintiff:

A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding. *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir.1983); *see Mull v. Ford Motor Co.*, 368 F.2d 713, 715 (2d Cir.1966).

See also: Kaplan v. Aspen Knolls Corp., 290 F. Supp.2d 335, 339 (E.D.N.Y. 2003):

a complaint may not allege inconsistent facts, e.g., whether or not there was an agreement, because allegations of fact are binding judicial admissions....

As plaintiff alleged in both the original and amended complaints that there were no agreements between plaintiff and defendants, plaintiff is barred from pursuing any claims based upon the existence of agreements between the parties.

**(B) Plaintiff's Answers to Contention Interrogatories Constitute Binding Admissions**

At the conclusion of discovery, defendants served plaintiff with a short set of contention interrogatories. Specifically, defendants asked plaintiff whether or not it contends that William Stewart executed the Assignment and Agreement:

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<sup>1</sup> The Court in its October 5, 2011 Order granted defendants leave to raise the issue of plaintiff's election of remedies in connection with dispositive motion practice.

**CONTENTION INTERROGATORY NO. 1:** Do you contend that William A. Stewart did not execute the Assignment annexed hereto as Exhibit 1?

**CONTENTION INTERROGATORY NO. 3:** Do you contend that William A. Stewart did not execute the Agreement annexed hereto as Exhibit 2?

When plaintiff refused to provide a yes or no answer to these two questions, defendants applied before Magistrate Judge Cott, who directed that they be answered “yes” or “no.” Plaintiff’s answers to these interrogatories in the affirmative constitute a binding judicial admission and therefore preclude the maintenance of any claims arising out of allegations that there was an agreement between the parties which entitled plaintiff to royalties and other relief.

As held in Wechsler v. Hunt Health Systems, Ltd., 1999 WL 672902 (S.D.N.Y.) at \*1-2, answers to contention interrogatories constitute binding judicial admissions and are preclusive against the answering party:

Contention interrogatories issued pursuant to Rule 33 of the Federal Rules of Civil Procedure are one of many discovery tools designed to assist parties in narrowing and clarifying the disputed issues and reducing the possibility of surprise at trial. Such interrogatories may seek a variety of information from a party to the litigation, including identification of a party’s legal positions regarding a given issue and the evidence on which those contentions are based.

As is the case regarding other modes of discovery, the party answering a contention interrogatory is obligated “to respond truthfully and completely.” *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 456 (2d Cir.1975). Toward that end, the answering party is usually afforded ample opportunity fully to reflect on the question, to consult all pertinent sources of information bearing on it, and to seek the advice and assistance of counsel in order to craft answers that provide a full and accurate disclosure. *See Guadagno v. Wallack Ader Levithan Assocs.*, 950 F.Supp. 1258, 1261 (S.D.N.Y.), *aff’d*, 125 F.3d 844 (2d Cir.1997), cert. denied, 118

S.Ct. 1066 (1998). The answers to the interrogatories are then set forth in writing and are treated by courts in this Circuit as “judicial admissions” that generally estop the answering party from later seeking to assert positions omitted from, or otherwise at variance with, those responses. *See Wechsler*, 1999 WL 397751, at \*11.

See also: Hamelin v. Faxton-St. Luke’s Healthcare, 274 F.R.D. 385, 390 (N.D.N.Y. 2011):

The Second Circuit has not ruled on the issue of whether interrogatory responses are binding judicial admissions but several district courts have determined they are. *See, e.g., Med. Educ. Dev. Servs., Inc. v. Reed Elsevier Group, PLC*, No. 05 Civ. 8665, 2008 WL 4449412, at \*11 (S.D.N.Y. Sept. 30, 2008) (“[I]n this Circuit, contention interrogatories are treated as judicial admissions ‘that generally stop the answering party from later seeking to assert positions omitted from, or otherwise at variance with, those responses.’”) (quoting *Wechsler v. Hunt Health Sys., Ltd.*, No. 94 Civ. 8294, 1999 WL 672902, at \*2 (S.D.N.Y. Aug. 27, 1999)); *see also Zeigler v. Marriott Int’l, Inc.*, No. 03 Civ. 7688, 2005 WL 1022431, at \*11 (S.D.N.Y. May 2, 2005) (plaintiff’s complaint and interrogatory responses “constitute admissions and limit his potential claims”); *Guadagno v. Wallack Ader Levithan Assocs.*, 950 F.Supp. 1258, 1261 (S.D.N.Y.1997) (observing that interrogatory responses are generally treated as judicial admissions, and that “[a] judicial admission is conclusive, unless a court allows it to be withdrawn”), *aff’d* 125 F.3d 844 (2d Cir.1997) (unpublished table decision).

and The Prince Group, Inc. v. MTS Products, 1998 WL 273099 (S.D.N.Y.) at \*3:

Evidentiary admissions, such as answers at depositions or during trial testimony, can later be contradicted and explained. *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir.1995); *Guadagno v. Wallack Ader Levithan, Assocs.*, 950 F.Supp. 1258, 1261 (S.D.N.Y.1997). However, judicial admissions, such as stipulations or answers to contention interrogatories, are answered with the assistance of counsel and have the effect of precluding entire legal issues from a case. *Id.* Judicial admissions, however, may not be controverted unless a court allows them to be withdrawn. *Id.*

As plaintiff’s response to defendants’ contention interrogatories contends that William



Stewart did not sign the Assignment and Agreement, this admission is binding and precludes plaintiff from asserting the following claims: Count Seven, for breach of the Assignment and Agreement; Count Eight, for unjust enrichment for failing to pay monies due under the Assignment and Agreement; and Count Nine, for rescission of the Assignment and Agreement.

**(C) Plaintiff's Deposition Testimony Is An Admission**

In its deposition the Estate's representative testified that she did not know whether Mr. Stewart had any agreements with any music publishing companies other than his own. In addition, during discovery plaintiff did not produce any agreements between Stewart and any defendant. Accordingly, the testimony that there was no agreement between plaintiff and defendants constitutes an evidentiary admission, as held in Guadagno v. Wallack Ader Levithan Associates, 950 F. Supp. 1258, 1261 (S.D.N.Y. 1997):

When a party testifying at trial or during a deposition admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an evidentiary admission (citing *Keller v. United States*, 58 F.3d 1194, 1199 n. 8 (7<sup>th</sup> Cir. 1995)).

**(D) The Factual Allegations Are Irreconcilable And The Remedies Are Inconsistent**

Plaintiff's allegations in the complaints, that defendants are copyright infringers because they have no rights to exploit "No Diggity," cannot be reconciled with the claims seeking monies under agreements between the parties.

While Federal Rule of Civil Procedure 8(d)(3) permits a party to plead alternate claims, such claims may not be based upon inconsistent facts, as held in Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp.2d 609, 610 n. 10 (S.D.N.Y. 2003):

A complaint may not allege inconsistent facts - e.g., whether there

was an agreement-because facts are binding judicial admissions.  
*See Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528  
(2d Cir.1985).

As noted in *Prudential Oil Corp. v. Phillips Petroleum Co.*, 418 F. Supp. 254, 257 (S.D.N.Y.  
1975), remedies are inconsistent if they are based on inconsistent facts:

For remedies to be inconsistent, it must be shown that “a  
certain state of facts relied on as the basis of a certain remedy is  
inconsistent with, and repugnant to, another certain state of facts  
relied on as the basis of another remedy.” 25 *Am.Jur.2d, Election  
of Remedies* s 11.

See also: *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S. Ct. 1011, 1020 (1974):

That doctrine [of election of remedies] refers to situations where an  
individual pursues remedies that are legally or factually  
inconsistent,...

*Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corp.*, 10 F.2d 913, 916 (2<sup>nd</sup> Cir.  
1926):

The doctrine of election of remedies is applicable only in cases  
where the second remedy is clearly inconsistent with the first.

*Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 291 (1921):

It [the doctrine of election of remedies], is only applicable ‘when a  
choice is exercised between remedies which proceed upon  
irreconcilable claims of right;’ ‘where there is, by law, or by  
contract, a choice between two remedies.’ One may not both  
affirm and disaffirm a contract; or take a benefit under an  
instrument and repudiate it (citations omitted).

and *Simon v. Boyer*, 51 App.Div.2d 879, 380 N.Y.S.2d 178, 181 (4<sup>th</sup> Dep’t 1976):

For purposes of the doctrine of election of remedies, inconsistent  
remedies are those which proceed on opposite and irreconcilable  
claims of rights (*Henry v. Herrington*, 193 N.Y. 218, 86 N.E. 29).  
The test is whether the facts necessary to support one remedy are  
consistent with the facts necessary to support the other (*Lumber*

*Mutual Casualty Ins. Co. of N.Y. v. Friedman*, 176 Misc. 703, 28 N.Y.S.2d 506).

**(E) Plaintiff's Summary Judgment Motion Constitutes  
A Binding Election of Remedies**

Plaintiff's motion for summary judgment on the copyright infringement claim constitutes a binding election of remedies and precludes plaintiff from pursuing contract-based claims.

As held in Petrello v. White, 2007 WL 2276300 (E.D.N.Y.) at \*5, plaintiff's election to move for summary judgment on its copyright infringement claim constitutes an election of remedies:

By moving for judgment as a matter of law on their original claims, Defendants made their election. *See LeBoeuf, Lamb, Greene & MacRae v. Old Republic Ins. Co.*, 243 A.D.2d 168, 177 (1st Dept.1998) ("As a matter of statute, a party is permitted to plead inconsistent theories of recovery.... However, summary judgment being the procedural equivalent of a trial, a litigant must elect among inconsistent positions upon seeking expedited disposition ....") (internal citations omitted); *Unisys Corp. v. Hercules Inc.*, 224 A.D.2d 365, 367 (1st Dept.1996) ("Even where a plaintiff may seek recovery on alternative theories, he must make an election of remedies at trial ... or upon submission of a motion for summary judgment ... the grant of which is the procedural equivalent of a trial ....") (internal quotations and citations omitted);....

See also: James Lang Wootton U.S.A. v. LeBoeuf, Lamb, Greene & MacRae, 243 App. Div.2d 168, 177, 674 N.Y.S.2d 280, 286 (1<sup>st</sup> Dep't 1998):

summary judgment being the procedural equivalent of a trial, a litigant must elect among inconsistent positions upon seeking expedited disposition (citations omitted).

and H.B.L.R, Inc. v. Command Broadcast Assoc., 156 App. Div.2d 151, 152, 548 N.Y.S.2d 198, 199 (1<sup>st</sup> Dep't 1989):

In addition, we note that while a party may plead alternate theories of recovery (*cf.*, 3 *Weinstein-Korn-Miller, NY Civ Prac* ¶ 3002.04), summary judgment, being the procedural equivalent of a trial (*Capelin Assocs. v. Globe Mfg. Corp.*, 34 NY2d 338), requires a choice as to the basis upon which recovery is sought (*see, Baratta v. Kozlowski*, 94 AD2d 454, 464).

#### **POINT IV**

#### **ALL CONTRACT-BASED CLAIMS MUST BE DISMISSED EVEN IF PLAINTIFF IS NOT PRECLUDED FROM ASSERTING THEM**

Plaintiff asserts three claims which are based upon the existence of agreements between Stewart and defendants: Count Seven is for breach of the Assignment and Agreement; Count Eight is for unjust enrichment arising out of defendants' failure to pay monies due plaintiff under the Assignment and Agreement; and Count Nine is to rescind the Assignment and Agreement. As plaintiff has taken the position on numerous occasions throughout the litigation that Stewart never entered into any agreements with defendants, plaintiff is precluded from asserting claims sounding in contract, for the reasons explained above. Nevertheless, even if plaintiff were permitted to assert these claims, defendants are entitled to summary judgment dismissing them, for the reasons explained below.

#### **(A) The Breach of Contract Claim Must Be Dismissed Since Stewart Itself Breached the Agreement**

The Stewart Estate claim for royalties due under its agreement with Sugar Hill cannot be sustained since it is undisputed that Stewart and his Estate have collected money from the exploitation of "No Diggity." As Stewart had assigned his interest in the copyright to Sugar Hill, Stewart did not have any authority to collect such income, as it was to be paid to Sugar Hill for disbursement. In fact, Stewart and his Estate collected over \$100,000.00 while Sugar Hill



collected about \$30,000.00. As the Stewart Estate breached the contract by collecting “No Diggity” income, it did not abide by the terms of the agreements between the parties and therefore cannot sue for their breach.

The law is well-settled that a plaintiff alleging a breach of contract must establish that it did not breach the agreement it is suing under. See, e.g.: Diesel Props S.R.L. v. Greystone Business Credit II LLC, 631 F.3d 42, 52 (2<sup>nd</sup> Cir. 2011):

In order to recover from a defendant for breach of contract, a plaintiff must prove, by a preponderance of the evidence, (1) the existence of a contract between itself and that defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by that defendant; and (4) damages to the plaintiff caused by that defendant's breach. *See, e.g., Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co. of New York*, 375 F.3d 168, 177 (2d Cir.2004); *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir.1996) (emphasis added).

RCN Telecom Services, Inc. v. 202 Centre Street Realty LLC, 156 Fed. Appx. 349, 350-351 (2<sup>nd</sup> Cir. 2005):

The elements of a breach of contract claim in New York are: (1) the existence of a contract, (2) performance by the party seeking recovery, (3) non-performance by the other party, and (4) damages attributable to the breach. *See Marks v. New York Univ.*, 61 F.Supp.2d 81, 88 (S.D.N.Y.1999) (emphasis added).

P&E Properties, Inc. v. United Natural Foods, Inc., 713 F.Supp.2d 262, 266-267 (S.D.N.Y. 2010):

Under New York law, a plaintiff's performance under the contract is an element of a breach of contract claim. *See JP Morgan Chase v. J.H. Elec. of N.Y.*, 69 A.D.3d 802, 803, 893 N.Y.S.2d 237 (2d Dep't 2010) (stating that elements of cause of action for breach of contract are “the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages”).

and A.S. Rosenthal Co. v. Brilliant Silk Mfg. Co., Inc., 217 A.D. 667, 217 N.Y.S. 138, 142 (1<sup>st</sup> Dep't 1926):

a party who seeks to recover damages from the other party to the contract for its breach must show that he himself is free from fault in respect of performance.

See also: Prime Mover Capital Partners LP v. Elixir Gaming Technologies, Inc., 2011 WL 2465963 (S.D.N.Y.) at \*12; Ancile Investment Co. Ltd. v. Archer Daniels Midland Co., 2011 WL 813724 (S.D.N.Y.) at \*5; Serdarevic v. Centex Homes LLC, 760 F. Supp.2d 322, 330-331 (S.D.N.Y. 2010); and IMG Fragrance Brands LLC v. Houbigant, Inc., 759 F. Supp.2d 363, 376 (S.D.N.Y. 2010).

As the Stewart Estate breached the agreement between the parties by collecting over \$100,000.00 which should have been paid to Sugar Hill under the terms of the Assignment, the Stewart Estate cannot establish that it performed its obligations under the Assignment, and therefore the breach of contract claim must be dismissed.

**(B) The Existence of Agreements Between The Parties Precludes an Unjust Enrichment Claim**

As noted in Rodgers v. Roulette Records, Inc., 677 F. Supp. 731, 740 (S.D.N.Y. 1988), there is no right to recover under an unjust enrichment theory when there is a contract between the parties:

Defendants correctly note, however, that plaintiff cannot recover under a theory of unjust enrichment "where an express contract exists between the parties concerning the same subject matter ..." *Nixon Gear & Machine Co., Inc. v. Nixon Gear Inc.*, 86 A.D.2d 746, 447 N.Y.S.2d 779, 781 (4th Dept.1982). To the extent royalties were due under the Contract, plaintiff cannot recover for unjust enrichment.

See also: IDT Corp. v. Morgan Stanley Dean Witter, 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 361 (2009):

Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded.

Goldner v. Possilico, 7 App. Div.3d 666, 776 N.Y.S.2d 818, 820 (2d Dep't 2004):

Further, the fifth cause of action against Willow Cliff and its general partners to recover damages for unjust enrichment should have been dismissed as duplicative of the second cause of action to recover damages for breach of contract (*see Bettan v. Geico Gen. Ins. Co.*, 296 A.D.2d 469, 745 N.Y.S.2d 545; *Walter H. Poppe Gen. Contr. v. Town of Ramapo*, 280 A.D.2d 667, 721 N.Y.S.2d 248).

As there are agreements between Stewart and Sugar Hill relating to the division of "No Diggity" income, specifically the Assignment and Agreement, there is no right to recover such income under an unjust enrichment theory.

**(C) Plaintiff Is Not Entitled to Rescission**

In the complaint the Stewart Estate seeks rescission of the May 25, 1999 Assignment and Agreement. For the reasons set forth below, this claim has no basis.

**(i) Stewart Has Been Paid**

As confirmed in the accompanying declarations of Joseph Robinson, Jr., and Lavaba Mallison, Sugar Hill paid Stewart \$2,500.00 as an advance in 1999 and has received about \$30,000.00 from its foreign licensees, so that Stewart would be owed about \$15,000.00. In addition, as explained by Mr. Robinson, Stewart and the Stewart Estate have collected over \$100,000.00 in violation of the Assignment, and owe Sugar Hill over \$40,000.00 as a result of

these improper collections. As Stewart received \$2,500.00 from Sugar Hill and owes Sugar Hill money in connection with his improper collections, there has not been a total failure of consideration and rescission is not an available remedy.

In Nolan v. Sam Fox Publishing Co., Inc., 499 F.2d 1394 (2<sup>nd</sup> Cir. 1974), a songwriter sought to rescind the publishing agreement with his music publisher, alleging that the publisher did not pay him 74% of royalties due him over a six year period. The Court held that rescission was not an available remedy, as it is only applied “in cases in which a publisher has made none of the royalty payments:”

Rescission has also been allowed, despite the absence of any showing of fraud, in cases in which a publisher has made none of the royalty payments. The rationale of these decisions is, of course, that an essential objective of a contract between a composer and publisher is the payment of royalties, and a complete failure to pay means this objective has not been achieved. Here, however, Fox did pay 26% Of the royalties due to Nolan for the applicable six-year period, and this partial payment of royalties due distinguishes this case from cases where there was total failure to pay the required royalties. *See Driver-Harris Co. v. Industrial Furnace Corp.*, 12 F.Supp. 918 (WDNY 1935); *Broadcast Music, Inc. v. Taylor*, 10 Misc.2d 9, 55 N.Y.S.2d 94 (Sup.Ct.1945); *DeMille Co. v. Casey*, 115 Misc. 646, 189 N.Y.S. 275 (Sup.Ct.1921). Id. at 1399.

See also: Caferty v. Scotti Brothers Records, Inc., 969 F. Supp. 193, 205 (S.D.N.Y. 1997): “a contract assigning rights in a musical composition cannot be rescinded for non-payment of royalties unless the failure to pay royalties is total.”

In the case at bar, Sugar Hill paid Stewart \$2,500.00 as an advance toward the Assignment in 1999, and in addition Stewart and his Estate has collected monies which should have been paid to Sugar Hill pursuant to the Assignment and therefore have received monies

which must be credited toward Sugar Hill's account. As there has not been a "complete failure to pay" monies to plaintiff it is not entitled to the equitable remedy of rescission. In fact, the Stewart Estate owes Sugar Hill about \$25,000.00.

**(ii) Stewart Is Liable for Payments Received in Violation Of the Assignment**

Having assigned his interest in the "No Diggity" copyright to Sugar Hill, Stewart was not entitled to receive any monies generated from its exploitation, as such monies should have been collected by Sugar Hill. As held in Superior Brassiere Co., Inc. v. Zimetbaum, 214 App. Div. 525, 527, 212 N.Y.S. 473, 475 (1<sup>st</sup> Dep't 1925):

If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee (citing *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 197, 44 S.Ct. 266 (1924)).

Claims between assignors and assignees may be used as offsets. For example, in Umansky v. Seaboard Industries, Inc., 45 App. Div.2d 1051, 358 N.Y.S.2d 22 (2<sup>nd</sup> Dep't 1974), assignees of a purchase money mortgage brought a foreclosure action and the mortgagor interposed a defense based upon the assignor's alleged breach of a collateral agreement. The Court held that: "any damages established by it [defendant] may be offset as against the amount due plaintiffs." 45 App.Div.2d at 1052, 358 N.Y.S.2d at 23.

As Stewart received monies which should have been paid to Sugar Hill under the terms of the Assignment, Sugar Hill is entitled not only to offset the amount wrongfully received by Stewart from monies due Sugar Hill, but also to seek an affirmative recovery in the amount of the monies wrongfully received by Stewart in excess of what would otherwise have been due him.



**(iii) Rescission Is Not Available Since Money Damages Are an Adequate Remedy**

The Stewart Estate alleges that it is entitled to royalties under its agreements with Sugar Hill. As money damages afford complete relief for the alleged breach of contract, the equitable remedy of rescission is not available, as held in Rudman v. Cowles Communications, Inc., 330 N.Y.S.2d 33, 43, 30 N.Y.2d 1, 13-14 (1972):

Assuming, however, that mutually dependent contracts were involved, plaintiffs are not entitled as a matter of law to rescission. Such relief, lying in equity, is a matter of discretion (*Calhoun v. Millard*, 121 N. Y. 69, 77; *Ungewitter v. Toch*, 31 A D 2d 583, 584, *affd.* 26 N Y 2d 687; *Feldman v. Metropolitan Life Ins. Co.*, 259 App. Div. 123, 124-125; *cf. Doyle v. Allstate Ins. Co.*, 1 N Y 2d 439, 443; CPLR 3017). Moreover, the equitable remedy is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored (6 N. Y. Jur., *Cancellation of Instruments*, §§ 2-4).

See also: New Shows, S.A. v. Don King Productions, Inc., 210 F.3d 355, 2000 WL 354214 at \*2 (2d Cir.): “since the legal remedy in this case is adequate, the equitable remedy of rescission is simply inappropriate;” and Laugh Factory, Inc. v. Basciano, 608 F. Supp.2d 549, 560 (S.D.N.Y. 2009), ruling that “the return of the money is indeed an adequate legal remedy that bars the claim in equity [for rescission].”

**(iv) The Stewart Estate’s Rescission Claim Is Barred by the Statute of Limitations**

The Stewart Estate alleges that it has not received any monies whatsoever from Sugar Hill, despite the fact that the Assignment to Sugar Hill was made in 1999. Under the holding in Carter v. Goodman Group Music Publishers, 848 F. Supp. 438, 445 (S.D.N.Y. 1994), a claim for rescission must be brought within six years after it accrues:

Rescission is an equitable remedy and is subject to a six year statute of limitations. See N.Y.Civ.Prac.L. & R. § 213(1) (McKinney 1990). A claim for rescission on the grounds of duress or unconscionability accrues upon the execution of the agreement. *See, e.g., Brown v. Tonawanda Housing, Inc.*, 123 A.D.2d 493, 507 N.Y.S.2d 92 (1986). Therefore, any claim for rescission of the 1979 Agreement expired in 1985. Accordingly, summary judgment is granted on all of these claims as well.

As the Stewart Estate alleges that neither Stewart nor the Estate ever received payments from Sugar Hill, and as the agreement was entered into in 1999, claims for rescission brought some 11 years later are time barred.

**(v) Stewart Has Not Offered to Restore What Was Received**

As held in E.T.C. Corp. v. Title Guarantee & Trust Co., 271 N.Y. 124, 127 (1936), a party seeking rescission must as a prerequisite to the relief offer to restore all consideration received:

In an action at law based upon a rescission of a voidable contract, the rule has long been established that the party must restore or offer to restore before suit whatever he has received by virtue of the contract.

In an equitable action for rescission, it is sufficient to make the offer in the complaint (citations omitted).

Whether the Stewart Estate's request for rescission of the agreements is deemed an action at law (in which event the offer to restore must be made before suit) or in equity (in which event the offer must be made in the complaint), the Stewart Estate's claim for rescission must be dismissed because it never made the requisite offer at any time.

**(vi) Lavaba Mallison Has Not Been Joined As A Party**

The Stewart Estate seeks to rescind both the Assignment and the Agreement. With

respect to the Assignment, on its face it is a conveyance of Stewart's interest in the "No Diggity" copyright to Sugar Hill Music, and does not require any payments from Sugar Hill to Stewart. Therefore, unless this Assignment is read in conjunction with the Agreement, the Stewart Estate is not entitled to rescind the Assignment based upon non-payment of monies.

If the Agreement is read in conjunction with the Assignment the rescission claim must nevertheless be dismissed since Lavaba Mallison, a party and signatory to the agreement, is not a party to this action. As the Agreement specifies that Mr. Mallison is to receive 20% of the income collected by Sugar Hill, he must be named as a party to a rescission claim since his rights would be affected. See e.g.: American International Specialty Lines Ins. Co. v. Towers Financial Corp., 198 B.R. 55, 62 (S.D.N.Y. 1996):

Under New York law, "[i]n an action for rescission, all parties to the agreement must be joined as necessary parties,..." (citations omitted).

Frymer v. Bell, 99 App.Div.2d 91, 95, 472 N.Y.S.2d 622, 625 (1<sup>st</sup> Dep't 1984): "In an action for rescission, all parties to the agreement must be brought before the Court (citations omitted);" and Tudor v. Riposanu, 93 App. Div.2d 718, 461 N.Y.S.2d 6 (1<sup>st</sup> Dep't 1983): "In an action for rescission, all parties to the agreement must be joined as necessary parties (citations omitted)."

**(D) The Court Lacks Subject Matter Jurisdiction of Plaintiff's Claims**

28 U.S.C. §1332(a) provides for subject matter jurisdiction "where the amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs." As set forth in the Robinson Declaration, the amount owed to the Stewart Estate (even if plaintiff is permitted to assert contract claims and Sugar Hill is not entitled to credits for the amounts wrongfully received by the Stewart Estate) is about \$15,500.00. Sugar Hill collected about



\$30,000.00, 60% of which (\$18,000.00) would be due plaintiff. However, Stewart received a \$2,500.00 advance, so that about \$15,500.00 would be owed, even if Sugar Hill is not credited with monies wrongfully received by Stewart. Therefore, the Court should dismiss plaintiff's contract claims (breach of contract, unjust enrichment and rescission) for lack of subject matter jurisdiction.

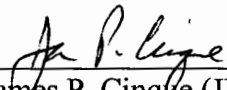
**CONCLUSION**

For the reasons explained above defendants' motion for summary judgment should be granted and the amended complaint dismissed.

DATED: NEW YORK, NEW YORK  
NOVEMBER 18, 2011

Respectfully submitted,

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